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In the Supreme Court of the United States

OCTOBER TERM, 1976

DAVID L. JONES, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF CORRECTION, ET AL., APPELLANTS

v.

NORTH CAROLINA PRISONERS' LABOR UNION, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether prison regulations that prohibit inmates from organizing or soliciting membership by other inmates in a "prisoners' union" violate the First and Fourteenth Amendments.

2. Whether principles of equal protection require prison officials to grant privileges to a "prisoners' union" to the same extent that other organizations are allowed to operate within the prison.

INTEREST OF THE UNITED STATES

This case presents important questions concerning the constitutionality of the efforts of correctional authorities to prevent the formation within the prison system of a so-called "prisoners' union." Although the case involves only the measures adopted by one state to halt the spread of that type of inmate organization, the Court's decision is likely to have a direct impact on the existing practices and procedures within the federal prison system.[1] Attempts have already been made to "unionize" the inmate population at certain federal correctional facilities, and these incidents have prompted the Bureau of Prisons to enforce a strict prohibition against all forms of inmate union activity. The federal ban is quite similar to the regulatory scheme at issue here.[2] The United

[1] The federal prison population presently stands at more than 28,000 inmates, incarcerated at 50 institutions of various types across the country. The Bureau of Prisons operates six penitentiaries, 22 federal correctional institutions, four prison camps, three metropolitan correctional centers, two detention centers, 12 community treatment centers, and one medical center.

[2] The federal government's restrictions on unionism are not expressly articulated in any Bureau of Prisons Policy Statement. Union activity has been prohibited under that portion of Policy Statement No. 7300.115A, "Inmate Organizations" (December 9, 1974), governing inmate organizations generally, which states: "Any inmate organization which would work in opposition to the orderly function and operation of the institution will not be approved." Pursuant to this policy, the Bureau, like the State of North Carolina, has made solicitation activities by inmates on behalf of any union organization a breach of prison disciplinary rules, prohibits inmate union meetings, denies any union group the privilege of mailing its literature in bulk into federal prisons, and denies visiting privileges to those who seek to enter a federal institution solely for the purpose of encouraging or aiding the formation of an inmate union.

States thus has a direct and immediate interest in the resolution of the constitutional issues presented.

STATEMENT

1. The State of North Carolina has chosen to prevent those incarcerated within its prisons from forming or operating a "union." Regulations of the State Department of Correction adopted pursuant to this policy determination provide that no prison official shall "authorize the use of Departmental facilities for such organization, negotiate with, bargain with, or otherwise enter into discussion with such an organization or representative of such organization, nor permit such organization to hold meetings or assembly on Departmental property" (J.S. App. 37). These regulations also state (*id.* at 38):

> Persons in the custody of the Department of Correction are prohibited from soliciting other inmates about membership in any inmate union. If the officer in charge has reason to believe that correspondence between inmates concerns organization of an inmate union in violation of this rule, then the correspondence may be censored and if necessary delivery may be withheld. Any inmate accused of soliciting shall be subject to discipline for agitating and failing to obey a lawful order. The unit superintendent or his designated representative shall proceed against the inmate accused in accordance with established Departmental procedures.

Acting pursuant to these regulations, State correctional officials prohibited prisoners from soliciting

other inmates to join appellee North Carolina Prisoners' Labor Union, Inc. ("the Union") and refused to deliver packets of Union publications that had been mailed in bulk to selected inmates for redistribution to other prisoners. Furthermore, the authorities forbade Union meetings on departmental property and cancelled the visiting privileges of paralegal assistants to an attorney for the Union after it was discovered that they had entered the prison solely to discuss organizational strategy with Union members (J.S. App. 24–25).

2. Appellee, a North Carolina corporation whose stated goal is "the promotion of charitable labor union purposes" and the formation of a "prisoners' labor union at every prison and jail in North Carolina to seek through collective bargaining * * * to improve * * * working * * * conditions" (J.S. App. 21, n. 1), instituted this action on March 18, 1975, in the United States District Court for the Eastern District of North Carolina to challenge the anti-union regulations of the State Department of Correction. The complaint, based on 42 U.S.C. 1983, alleged that the State's efforts to prevent operation of a prisoners' union within its correctional institutions violated the rights of Union members to association and assembly under the First and Fourteenth Amendments to the United States Constitution and that the refusal to grant the Union privileges accorded other inmate organizations within the prison system deprived it

of equal protection of the laws (A. 7–8). The Union further alleged that prison officials had unconstitutionally interfered with correspondence between inmate Union members and representatives of the Union outside the prison and had terminated the visiting privileges of the Union attorney's paralegal assistants, in violation of the inmates' rights to counsel and access to the courts (A. 8). Substantial damages and a declaratory judgment and injunction against the continuation of these practices were sought (A. 9–10).

3. A three-judge district court, convened pursuant to 28 U.S.C. 2281 and 2284, granted appellee limited injunctive relief (409 F. Supp. 937; J.S. App. 20–32). At the outset, the court expressly declined to determine "whether prisoners * * * have a constitutional right to join a corporate association of inmates," since "the parties agree that [State correctional officials] permit inmates to join the Union" (J.S. App. 22, 23). In view of what the court took to be a state policy countenancing union membership, the court perceived the question presented to be whether the State had any continuing legitimate interest in regulating expression among inmates on the subject of prison unions or in prohibiting solicitation or organizational activities on behalf of such groups. The court concluded that the State lacked any such interest, holding that "[t]o permit an inmate to join a union and forbid his inviting others to join borders on the irrational" (*id.* at 27–28). It therefore enjoined State correctional authorities from preventing inmate Union members from soliciting

other prisoners to join the Union "orally or by written or printed communication" (*id.* at 32) and from "refus[ing] receipt of the Union's publications on the ground that they are calculated to encourage membership in the organization or solicit joining" (*id.* at 28–29).

Furthermore, the court held that the Equal Protection Clause of the Fourteenth Amendment prohibited the State from picking and choosing among inmate organizations "depending upon its approval or disapproval of the message or purpose of the group" (J.S. App. 29). Hence, absent a showing that the Union was "detrimental to proper penological objectives" or would constitute a "present danger to security and order" (*id.* at 29, 30)—a showing the court believed the State was incapable of making in view of its failure to forbid union membership by inmates of its prisons (*id.* at 29)—correctional officials were required to permit outsiders to visit those inmates with whom they "are engaged * * * in legitimate Union projects to the same extent that other members of free society are admitted for like purposes" and were obliged to accord the Union mass mailing and meeting privileges to the same extent that other inmate organizations enjoyed such privileges within the prison (*id.* at 33–34).[3]

SUMMARY OF ARGUMENT

1. Inherent in the very nature of imprisonment is the substantial deprivation of a person's liberty.

[3] The Union's request for damages and attorney's fees was denied (J.S. App. 21–22).

"Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price* v. *Johnston,* 334 U.S. 266, 285. In the First Amendment context, the test for determining whether a prison regulation works an impermissible abridgment of associational freedoms was articulated in *Pell* v. *Procunier,* 417 U.S. 817, 822:

> [A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law.

Application of these principles indicates that the district court erred in invalidating the State's regulation prohibiting the solicitation or formation of an inmate union within its penal institutions. State prison officials had a rational basis for concluding that the operation of an inmate union within the confines of a prison would have a significant adverse effect on the rehabilitative goals of the institution and would pose a serious potential menace to its security. In the absence of a showing that the officials exaggerated their response to these legitimate concerns, the district court should have deferred to their expert judgment in such matters.

Prisons are closed societies of proven lawbreakers under the constant supervision and control of a limited staff. Widespread hostility and frustration make the atmosphere frequently tense and volatile. The presence of any concerted inmate activity within a prison therefore is a cause for concern, but an inmate union, with its exclusive focus on the expression and attempted resolution of prisoner grievances and its potential for collective action, would present an especially dangerous threat to the physical safety of the prison community. Persons tend to behave with greater emotion and fewer inhibitions when acting as part of a group. Moreover, experience indicates that the leadership of an inmate union would most likely be composed of prisoners who are serving long sentences, generally for crimes of violence, and who thus have demonstrated the greatest tendency in the past toward the use of force as a problem-solving technique.

Inmate unionism also would inhibit attempts to inculcate a new value system in prisoners, to prepare them for a law-abiding life in the outside world. Bargaining between inmate groups and prison officials over conditions of confinement and rules of discipline within the institution may lead to an erosion of the concept of societal control and authority in the minds of the inmates. A formal union structure interposed between the prisoners and correctional staff also would destroy the direct supervisory relationship essential to the reorientation of inmate values and would delegate substantial power within the prison to persons

having no responsibility for, and perhaps little interest in, its successful operation.

The unique features of the prison system suggest that the decision to permit inmate unions to function should be imposed not by courts but by correctional authorities, in whose sound discretion the individual needs of each class of inmates and of the institutions in which they are incarcerated may be weighed. Particularly in view of the availability of a number of other effective means by which prisoners may communicate their complaints about prison conditions and may obtain relief from abuses, including a formal grievance procedure, a ban on the operation of inmate unions does not violate the First Amendment.

2. The district court also erred in concluding that principles of equal protection require correctional officials to grant identical operating privileges to all inmate organizations that do not pose a clear and present danger to the security of the institution. The decision to permit any organized group to function within the prison walls demands a delicate assessment of the character of the inmate population and the nature and composition of the particular group. A ruling that prison officials may not act to control concerted action by prisoners without some articulable threat to prison security would seriously intrude upon their discretion to fashion or prohibit programs depending upon an expert appraisal of their penological value. Similarly, a ruling that every inmate organization not posing a direct threat to prison secur-

ity must be accorded privileges within the prison system equal to those given any other organization would prevent experimentation with varied forms of inmate group activity, to the detriment of correctional goals.

All that the Equal Protection Clause demands is that the distinctions drawn by the state in an "effort to encourage for its prisoners constructive future citizenship" have "some rational basis to sustain them." *McGinnis* v. *Royster,* 410 U.S. 263, 269–270. The determination by the State's correctional authorities to prohibit inmate union activity because of the serious rehabilitative and security problems it would cause, while permitting other organizations presenting none of those problems to operate prison chapters, meets that criterion.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT REQUIRE PRISON OFFICIALS TO PERMIT INMATES TO SOLICIT MEMBERSHIP IN AND OPERATE A PRISON UNION

The district court's characterization of its decision as involving only "narrow issues" of "peripheral" importance (J.S. App. 23, 27) should not be permitted to obscure or minimize the significance of this case. The district court began with the premise that the case does not present the question "whether prisoners * * * have a constitutional right to join a corporate association of inmates" (*id.* at 22), because the State technically permits those incarcerated in its institutions to become members of a prison union. But the court misunderstood the State's policy with regard to inmate

unionization and exaggerated the extent to which that policy is in fact permissive.

As we understand the State's policy, inmates are not precluded from joining a union because membership *per se* incurs no dues or other obligations. A prisoner may join the Union, for example, merely by calling himself a "member." Under these circumstances, a prohibition against "membership" would be impossible to enforce. Nominal affiliation with a "union," however widespread within the inmate population, assumes significance only when such membership is the precursor of some form of concerted organizational activity. It is against this possibility of group activity—the solicitation of membership in and actual operation of a prisoners' union—that the State's regulatory scheme is aimed.

By invalidating the State's regulations, the court below effectively has deprived prison authorities of the power to promulgate and enforce measures reasonably calculated to prevent inmates who are interested in forming a union—or any other organization not posing a clear and present danger—from coalescing into a group and operating as such within the prison system. The district court's analysis conflicts with this Court's recent observation that "challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections systems, to whose custody and care the prisoner has been committed in accordance with due process of law." *Pell* v. *Procunier,* 417 U.S. 817, 822.

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While paying lip service to these principles (J.S. App. 29), the court has adopted an unworkable and dangerous standard—*i.e.*, that prisoners have a First Amendment right to communicate with fellow inmates about any subject of mutual interest, which right may be abridged only when demonstrably essential "to restore and protect security and order" (*id.* at 28). This standard fails to assess an inmate's associational interests in terms of his "status as a prisoner" (*Pell* v. *Procunier, supra,* 417 U.S. at 822) and gives insufficient weight to the expert judgment of correctional officials concerning the optimum manner in which to accomplish valid penological objectives or to preserve a peaceful and productive relationship within the prison system.

Any analysis of the issues raised by appellee's attempt to unionize the State's inmates must begin with the paramount consideration that this case "arises in the context of prisons" (*Procunier* v. *Martinez,* 416 U.S. 396, 412) and that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price* v. *Johnston,* 334 U.S. 266, 285. See also *Wolff* v. *McDonnell,* 418 U.S. 539, 555; *Pell* v. *Procunier, supra,* 417 U.S. at 822. In seeking a "mutual accommodation between institutional needs and objectives [of prisons] and the provisions of the Constitution that are of general application" (*Wolff* v. *McDonnell, supra,* 418 U.S. at 556), the Court has repeatedly recognized the need for major restrictions on prisoners' rights.

An inmate, for example, is not entitled to a number of procedural protections at a prison disciplinary hearing that would be accorded at a parole or probation revocation proceeding, solely because of factors unique to the institutional setting (*Wolff* v. *McDonnell, supra,* 418 U.S. at 561–562), nor does he enjoy the same right of privacy or protection against searches and seizures as do free citizens. *Lanza* v. *New York,* 370 U.S. 139, 143. See also *Bonner* v. *Coughlin,* 517 F. 2d 1311, 1315–1317 (C.A. 7); *United States* v. *Dawson,* 516 F. 2d 796, 805 (C.A. 9), certiorari denied, 423 U.S. 855.

Similarly, in the context of First Amendment guarantees, the courts have concluded that an inmate's associational liberties necessarily must be abridged substantially by virtue of incarceration. Thus, in *Pell* v. *Procunier, supra,* a blanket prohibition on access by prisoners to the news media was upheld, although the Court conceded that the regulation "restricts one manner of communication between prison inmates and members of the general public beyond the prison walls" (417 U.S. at 823); in *Procunier* v. *Martinez, supra,* 416 U.S. at 413, prison mail censorship meeting specified criteria was sustained; and in *Meachum* v. *Fano,* No. 75–252, decided June 25, 1976, the broad discretion of correctional officials to transfer an inmate between prison facilities was upheld despite the inevitable disruption of whatever associations the inmate may have cultivated in a particular prison. See also *Montanye* v. *Haymes,* No. 74–520, decided June 25, 1976. Pris-

oners have no protectible interest in assignment to a particular work detail (*Bryan* v. *Werner*, 516 F. 2d 233, 240 (C.A. 3)) or training program (*Sellers* v. *Ciccone*, 530 F. 2d 199, 201–204 (C.A. 8)) and may even be segregated from the rest of the prison population so long as the decision is not discriminatory and the conditions of confinement are otherwise humane. See *Sweet* v. *South Carolina Department of Corrections*, 529 F. 2d 854, 861 (C.A. 4) (*en banc*); *Kelly* v. *Brewer*, 525 F. 2d 394, 399–400 (C.A. 8); *Evans* v. *Moseley*, 455 F. 2d 1084, 1086 (C.A. 10), certiorari denied, 409 U.S. 889.[4]

The rationale underlying these restrictions is that imprisonment inherently is a major deprivation of the prisoner's liberty, although the degree of that deprivation may vary depending on the nature of the institution in which the prisoner is incarcerated, the term of imprisonment, other conditions contained in the sentencing authority's determination, and a variety

[4] Even when released on parole, a former prisoner enjoys only a "conditional liberty" (*Morrissey* v. *Brewer*, 408 U.S. 471, 480), and the government may impose restrictions on his freedom of association to "insur[e] that its rehabilitative goal is not frustrated and that the public is protected from further criminal acts by the parolee." *Birzon* v. *King*, 469 F. 2d 1241, 1243 (C.A. 2). See, *e.g.*, *Malone* v. *United States*, 502 F. 2d 554 (C.A. 9) (probationer convicted of smuggling guns to the Irish Republican movement lawfully may be restricted from associating with Irish cultural groups), certiorari denied, 419 U.S. 1124; *United States* v. *Kohlberg*, 472 F. 2d 1189 (C.A. 9) (approving restriction on probationer's association with known homosexuals); *Hyser* v. *Reed*, 318 F. 2d 225, 239 (C.A.D.C.) (*en banc*) (approving restriction on probationer's right to frequent pool halls), certiorari denied *sub nom. Thompson* v. *United States Board of Parole*, 375 U.S. 957. Cf. *Arciniega* v. *Freeman*, 404 U.S. 4.

of other factors. Unlike the outside world, the prison environment is typically a closed society in which a number of inmates reside involuntarily in close, round-the-clock proximity, often for substantial periods of time, under the supervision and control of a limited number of prison staff members. For prisoners, as this Court has noted, "eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the [government] * * *." *Preiser* v. *Rodriguez*, 411 U.S. 475, 492.

Moreover, the important functions of the correctional system would be hindered if substantial limitations on the freedom of inmates could not be imposed, since the success of crime deterrence and rehabilitation is dependent in large part upon the regimentation and discipline of those who have been incarcerated. Finally, "central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves. It is in the light of these legitimate penal objectives that a court must assess challenges to prison regulations based on asserted constitutional rights of prisoners." *Pell* v. *Procunier, supra*, 417 U.S. at 823. See also *Procunier* v. *Martinez, supra*, 416 U.S. at 412.

Prison regulations barring the solicitation of membership in and operation of inmate unions are the product of an expert assessment of these considerations. In developing such rules, the State Department of Correction, like the Federal Bureau of Prisons, has attempted to take into account the overriding need for prison security and the important rehabili-

tative purposes served by disciplined incarceration. Although the Union and the district court (J.S. App. 28) assume that these penological notions are outmoded, and arguments may be made for permitting prison unions to function, it is not for the courts "to choose one set of values over the other." *Richardson* v. *Ramirez*, 418 U.S. 24, 55. "Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Pell* v. *Procunier*, *supra*, 417 U.S. at 827.

A. THE DEMANDS OF PRISON SECURITY JUSTIFY SUBSTANTIAL RESTRICTIONS ON THE FIRST AMENDMENT RIGHT OF ASSOCIATION OF INMATES

Prisons differ radically from free society. They are populated by people who have not chosen to be there, but who have been incarcerated by authority of the state because they have been found to have violated one or more of the laws established by society for its orderly governance. Moreover, a large proportion of inmates are not in prisons for the first time. Although the range of offenses for which they have been committed is broad, including many major crimes of violence, all inmates share the characteristic of having on one or more occasions resorted to seriously illegal means in order to achieve their goals or to resolve problems confronting them. Against this background, the constant exposure of prisoners to the

close supervision and control of the prison staff may frequently breed hostility and tension between the two—to a greater extent and with a sharper focus than in almost any setting in the outside world. Prison life and inmate-staff relationships thus include an ever-present potential for explosive confrontations. See *Wolff* v. *McDonnell, supra,* 418 U.S. at 561–562. Cf. *Edwards* v. *Sard,* 250 F. Supp. 977, 981 (D.D.C.).

Confrontations can usually be handled with a minimum of disruption in the outside world, where the individuals affected may return to their respective homes, avoid further contact, and vent their emotions in less explosive surroundings. But diffusion of antagonisms occurs less readily in the typical prison setting, where the parties always remain in close proximity to each other. Because of these explosive conditions, any form of concerted activity inside the prison walls is a potential danger to security, but inmate unionism—with its exclusive focus on inmate grievances and their resolution—is especially prone to contribute to the high level of tensions. Many inmates are impulsive and action-oriented. See Halleck, *Psychiatry and the Dilemmas of Crime* 284 (1st ed. 1967); Eysenck, *Crime and Personality* 144 (1964). These traits are likely to be magnified when expressed through a union, for individuals tend to behave more emotionally and are more prepared to take risks when they act as part of a group rather than alone. See Wallach, Kogan, and Bem, *Group Influence on Individual Risk Taking,* 65 Journal of

Abnormal and Social Psychology 75 (August 1962).

To be sure, responsible prison leaders might be capable of restraining the excesses of their followers. But studies suggest that the leadership of an inmate organization such as a union is most likely to consist of hardened criminals who are serving long sentences, generally for serious crimes of violence. Schrag, *Leadership Among Prison Inmates,* in *Readings in Criminology and Penology* 536, 542 (Dressler ed. 1964). See also Barabedian, *The Natural History of an Inmate Community in a Maximum-Security Prison,* 61 Journal of Criminal Law, Criminology and Police Science 78, 80 (1970); McCorkle and Korn, *Resocialization Within Walls*, 293 Annals of the American Academy of Political and Social Science 88, 89 (May 1954). Thus, those inmates who have demonstrated the greatest tendency to use force as a problem-solving technique would be likely to play the major role in determining the union's course of action in any confrontation with prison officials.[5]

Moreover, the problems posed by an inmate union are compounded by its potential impact in a jurisdic-

[5] The extreme anti-social attitudes previously exhibited by those most likely to occupy a position of power in the union also inevitably will result in breaches of prison discipline, unrelated to union activity, by union leaders. In such circumstances prison officials would be placed in the dilemma either of punishing the inmate—and thereby taking the risk of a major disorder if the leader asserts, or his followers believe, that the punishment actually was for union activity—or of ignoring the infraction. Experience in prisons that have permitted unions to function suggests that some wardens have chosen the latter course, with the consequent impairment of their control over the institution. See Remick, *In Constant Fear* (1975).

tion, such as North Carolina, with a number of correctional facilities.[6] If allowed to function, the union would possess the capability of engineering system-wide disruptions that could severely strain a prison system's ability to mount a successful effort to restore order at any one institution. While such outbreaks are always a possibility even in the absence of inmate unionism, a formal organizational structure linking all of those incarcerated in a state's various institutions, which inevitably would lead to establishment of regular lines of communication between union "locals" and a shared allegiance and community of interest, would greatly increase the chances of wide-scale unrest. Indeed, chapters of the union at other prisons might be encouraged to engage in "sympathy" disruptions in the knowledge that the state's ability to respond effectively to the initial disobedience would be compromised if it were forced to divert a portion of its limited enforcement resources elsewhere.[7]

[6] The State maintains a prison system composed of 77 different units for adult convicts (A. 60). The federal government maintains 50 separate institutions. See note 1, *supra.*

[7] James W. Mullen, Warden of the Adult Correctional Institutions in Rhode Island, who has had prior experience with prison unions, addressed this possibility in his deposition (A. 73): "I think in looking at the picture of that situation, you know, at any given moment, through any type of communication, you could have your hands full. If the word was given that a prison in Raleigh that * * * at 12:00 tomorrow, boys, we don't move. We just sit there. The State of North Carolina is in big trouble. You know, you'd have to get the Army to straighten it out for that violence in such an area, so spread out, you know, in that span, you know. It scares me." See also Deposition of Paul W. Keve, Delaware Director of Adult Corrections (A. 90, 102).

Finally, prison unionism frequently may result in breaches of security because unrest is the sole weapon inmates perceive as effective to protest their real or imagined grievances. Unlike unions in free society, which may exert economic pressure on employers by strikes or other means, the only concerted action available to inmates to enforce their demands would be a coordinated disobedience, violent or otherwise, of prison rules. As the district court acknowledged (J.S. App. 21, n. 1), correctional authorities have no obligation to recognize or to bargain collectively with an inmate union, yet a refusal to bargain with the chosen representatives of the prisoners undoubtedly would be misinterpreted as indifference to inmate problems and might easily fan flames of violence or mutiny within the close confines of a prison.

The district court gave little or no weight to these critical considerations unique to the prison setting. While the court acknowledged that, "[i]f the day should ever come that inmates threaten concerted action to force compliance with their demands and to disrupt prison discipline," State prison officials lawfully could take the steps necessary to restore order (J.S. App. 28), it nonetheless gave dispositive weight to the fact that "[t]his is not a case of riot" and that no evidence had been presented to show that the Union had thus far "been utilized to disrupt the operation of the penal institutions" (*ibid.*).

We submit that the court's unsubstantiated assumption concerning the efficacy of future remedies to prevent union-instigated disorder is insufficient to

overcome the expert judgment of the State's correctional officials that prisoners' unions would pose a serious potential threat to prison security—a judgment that is shared by the overwhelming number of states as well as the Bureau of Prisons and that is "peculiarly within the province and professional expertise of corrections officials" (*Pell* v. *Procunier, supra,* 417 U.S. at 827). As a practical matter, the decision to permit formation of an inmate union within a prison may be irreversible, and the consequences from an imprudent decision to allow unionism could be drastic. In view of the unquestionably rational basis for the determination that inmate organizations may contribute to unrest and may transform minor outbursts into major conflagrations, the Constitution does not compel prison officials to assume that risk merely because they are unable to present direct evidence of "present danger to security and order" (J.S. App. 30).

Indeed, the Union's failure thus far to create unmanageable difficulties suggests only that the State has been successful in its efforts to prevent those inmates who consider themselves to be "members" of the Union from functioning as a group capable of threatening institutional security. Nor is the Union's avowed dedication to peaceful reform at this time a valid barometer for forecasting its future actions. If it becomes a fixture in the prison system, the Union will be controlled by the inmates themselves, not by responsible outside advocates of non-violent prison reform.

Any realistic evaluation of the risk the Union poses therefore must be based not upon the representations of its organizers but rather upon an assessment of the character of the persons who ultimately will govern it and the special features of the institutional environment in which it will operate. A consideration of these critical factors indicates that the State's regulations prohibiting union solicitation or operation within its prison walls is a legitimate response to realistic evils it has a compelling interest to avoid.

B. REHABILITATIVE CONSIDERATIONS ALSO COUNSEL STRONGLY AGAINST THE RECOGNITION OF INMATE UNIONS

Imprisonment is now perceived as having as a major purpose the rehabilitation of the inmate through affirmative programs such as counselling and training. "[S]ince most offenders will eventually return to society, another paramount objective of the corrections system is the rehabilitation of those committed to its custody." *Pell* v. *Procunier, supra,* 417 U.S. at 823. Cf. *Williams* v. *New York,* 337 U.S. 241, 248–249, n. 13.

In line with this theory, institutional discipline is viewed by prison officials as no longer serving only the narrow purpose of maintaining order within the prison. It also is intended to serve the larger goals of the institution as a whole—*i.e.,* to assist each prisoner in developing self-reliance, self-control, self-respect, and self-discipline. The aim is not merely that the prisoner learn to conform to institutional rules and regulations, but also that he be imbued with the desire to

conform to accepted standards of individual and community life in the outside world. See Eysenck, *supra,* at 144–161.

Thus, it is now widely agreed by correctional authorities that

> [d]iscipline * * * looks beyond the limits of the inmate's term of confinement. It must seek to insure carry-over value by inculcating standards which the inmate will maintain after release. It must always be objective and must develop in the inmate personal responsibility to that social community to which he will return.

American Correction Association, *Manual of Correctional Standards* ch. 24.7. Accordingly, the stated goals of inmate discipline are now largely synonymous with those of the correctional process itself, *i.e.,* modification of the criminal value system. Richmond, *Prisoner Management and Control* 14 (1969).[8]

To maximize the rehabilitative effect of discipline, prison officials necessarily must have the ability to exercise unfettered control over an inmate's daily activities. Inmate unionization, at least to the extent that it is effective, undermines that ability. Formal bargaining between prison officials and the union over conditions of confinement and the rules of discipline would create the impression of equality in the prison

[8] It has been said that "[t]he administrative manipulation of rewards, favors, privileges, and punishments with a view to promoting changes in value identification" is "a central administrative objective" in obtaining a shift in the inmate's value orientation. Ohlin, *Modification of the Criminal Value System,* in *The Sociology of Punishment and Correction* 179 (Johnson ed. 1962).

power structure between the inmate population and those in positions of responsibility and thereby could lead to an erosion of the concept of societal control and authority in the minds of the inmates. Rehabilitational efforts to impress upon prisoners that rules imposed by others must be obeyed, whether or not they are beneficial to one's personal interests, would be obstructed.

Moreover, the union can be expected to function as an intermediary through which prison management must deal before it may enforce disciplinary rules against individual prisoners. Not only would this destroy the direct supervisory relationship between inmate and staff that is essential to the reorientation of values through discipline, but also it would in many cases prevent quick and simple punishment for infractions.[9]

Many inmates enter prison with feelings of hostility and frustration, perceiving themselves to have been no more culpable than others not convicted, to have been merely unlucky. In a large number of cases they refuse to acknowledge that their difficulties stem from their own distorted behavioral patterns. This refusal to accept guilt for wrongdoing and the concomitant tendency to project blame on others are thought by many experts to constitute the dynamic of an inmate

[9] Many behavioral scientists have emphasized that discipline generally should closely follow the violation if it is to be effective in behavior modification. See generally Bandora, *Principles of Behavior Modification* (1967); Krasner & Ullman, *Research in Behavior Modification* (1965); Skinner, *Science and Human Behavior* (1953).

social system, which typically is preoccupied with protesting injustices of prison life through repetitive challenges to prison authority. McCorkle and Korn, *supra*, at 88–89. See also Halleck, *supra*, at 306; Abrahamsen, *The Psychology of Crime* 110 (1st ed. 1960).

The prison social system is usually rigidly hierarchical in structure, with older, more hardened inmates normally occupying the positions of highest status. McCorkle and Korn, *supra*, at 89–90; Schrag, *supra*. The system sustains itself to the extent that it can successfully extort concessions from prison authorities. Daily prison life has been described as a series of "bargains' between correctional officers and inmate leaders, in which the officers agree to relax enforcement of disciplinary rules in exchange for the leaders' promise to maintain a modicum of order among their inmate followers. The leaders' ability to perform their part of the bargain depends in turn upon the selective application of their influence with the correctional officers on behalf of those followers willing to cooperate. See Note, *Bargaining in Correctional Institutions: Restructuring the Relation between the Inmate and the Prison Authority,* 81 Yale L.J. 726 (1972).

The norms of this inmate social system are inimical to the rehabilitative goals of imprisonment. The first such goal is to teach the inmate to accept responsibility for his own actions. To the extent that the inmate's natural tendency to avoid guilt and to blame others for his plight is reinforced by his participation in the inmate community, successful rehabilita-

tion is frustrated. Yet, if permitted to exist and given official sanction, inmate unionization would strengthen this pre-existing social system and thus complicate further the already difficult task of rehabilitation. The union would replace an informal and imperfectly organized set of relationships, in which not all inmates participate, with a formally constituted body of pervasive influence whose sole focus would be the defense of prisoners "rights" against the alleged depredations of insensitive prison authorities. The result would be the institutionalization of the already harmful norms of the existing inmate community. In addition, since the union is likely to be controlled by those inmates previously holding informal leadership roles, official recognition of the union would solidify and legitimate the power of those leaders to manipulate their followers (see A. 36), thus making it even more difficult to achieve inroads in the prison social structure and burdening even further the rehabilitative effort.[10]

[10] The unfortunate experience of one prison, the Massachusetts Correctional Institute at Walpole, with an inmate union has been described by an eyewitness. See Remick, *supra*. As a result of dishonest elections, the union in Walpole was "made up of the toughest, most prisonwise inmates, [and] became a tool of the hard-core violent convicts, whose only interest in prison reform [was] in manipulating the operation of the prison for their own personal benefit. By prisoners' rights they really meant the right to do everything they wanted, and at the top of the list of what they wanted was to run the prison." *Id.* at 62–63. See also *Wolff* v. *McDonnell*, *supra*, 418 U.S. at 561–562; *Sostre* v. *McGinnis*, 442 F. 2d 178, 202 and n. 47 (C.A. 2) (*en banc*), certiorari denied, 404 U.S. 1049; *Paka* v. *Manson*, 387 F. Supp. 111, 119–120 (D. Conn.).

C. REGARDLESS OF THE STRENGTH OF PENOLOGICAL CONSIDERATIONS, PRISONERS HAVE NO FIRST AMENDMENT RIGHTS TO FORM AND OPERATE A UNION WHERE, AS HERE, THERE ARE EFFECTIVE ALTERNITIVE MEANS OF EXPRESSING INMATE GRIEVANCES

The regulations challenged by appellee, like those of the Bureau of Prisons, were not designed to hamper the ability of inmates to comunicate their grievances about prison conditions to correctional officials, the courts, or the public at large, nor do they have that effect. To the contrary, the ban against the solicitation or organization of inmate unions merely affects one of several ways in which prisoners may voice their complaints and may seek relief from the authorities. Since the constitutionality of prison restrictions that are alleged to inhibit First Amendment interests must inevitably depend upon a balancing of the inmates' need to exercise their rights against the legitimacy of the governmental inhibition, the availability of these other, effective channels through which those who have been incarcerated may object to prison conditions and may obtain the correction of abuses is of overriding importance.

***Pell* v. *Procunier*, *supra*,** supports this conclusion. There the Court considered the constitutionality of a California regulation against face-to-face interviews between representatives of the news media and state prisoners. In assessing the inmates' claim that a blanket prohibition against such interviews violated their First Amendment right of free speech, the Court observed (417 U.S. at 826) that it frequently had held

"that reasonable 'time, place and manner' regulations [of communicative activity] may be necessary to further significant governmental interests, and are permitted" (*Grayned* v. *City of Rockford*, 408 U.S. 104, 115) and that the prison regulation therefore "cannot be considered in isolation but must be viewed in the light of the alternative means of communication permitted under the regulations with persons outside the prison." 417 U.S. at 823. Since California's prisoners could communicate with persons on the outside through the mails and were afforded the opportunity to receive limited visits from family, clergy, legal counsel, friends, and prior acquaintances, the Court concluded that the state's "restriction on one manner in which prisoners can communicate with persons outside of prison" did not "abridge any First Amendment freedoms retained by prison inmates." *Id.* at 828.[11]

[11] In a related context, the Court recently upheld restrictions on political campaigning at the Fort Dix Military Reservation against a First Amendment challenge. *Greer* v. *Spock*, 424 U.S. 828. Although the Army regulation directly prohibited one means by which servicemen could learn about the issues of an election campaign and also limited the opportunity of political candidates to solicit the votes of those living on the base, the regulation served the important interest of avoiding military involvement in partisan politics. The Court struck the balance in favor of the public's interest in preserving the political neutrality of the armed forces. In his concurring opinion, Mr. Justice Powell focused on the availability of alternative channels for the flow of campaign information to Fort Dix personnel (*id.* at 847): "Political communications reach military personnel on bases in every form except when delivered in person by the candidate or his supporters and agents. The prohibition does not apply to television, radio, newspapers, magazines, and direct mail. Nor could there be any prohibition on handing out leaflets and holding campaign rallies outside the limits of the base. Soldiers may attend off-base rallies as long as they do so out of uniform. The candidates, therefore, have alternative means of communicating with those who live and work on the Fort; and servicemen are not isolated from the information they need to exercise their responsibilities as citizens and voters."

See also *Kleindienst* v. *Mandel*, 408 U.S. 753, 765.

Like the regulations at issue in *Pell*, the prohibitions against inmate unions enforced by the State and the Bureau of Prisons have at most an incidental and remote impact on whatever residuum of First Amendment rights of association and communication prisoners retain. Prisoners remain free to write letters to public officials, legal counsel, the news media, and other interested individuals and outside groups, in which they may criticize the policies of the correctional authorities and complain about the conditions of their confinement. See *Procunier* v. *Martinez, supra,* 416 U.S. at 413. They also may utilize visits to the prison by family, friends, attorneys and other persons for that purpose. Furthermore, prisoners have unrestricted access to the court to challenge the legality of the conditions of their confinement. *Johnson* v. *Avery,* 393 U.S. 483.

Finally, and perhaps of prime significance, prisoners already have at their disposal an inmate grievance procedure through which they may inform correctional officials of their complaints about prison conditions and may secure complete remedial action.[12] In the fed-

[12] The State's grievance mechanism (see Brief for Appellants at 22, n. 11) is described in detail in the affidavit of Ralph D. Edwards, Director of Prisons in the North Carolina Department of Correction (A. 127). See also Affidavit of David L. Jones, Secre-

eral system the Bureau of Prisons has established an Administrative Remedy Procedure under which an inmate is encouraged to attempt to resolve his grievance first through discussions with prison staff. See Policy Statement No. 2001.6A, "Administrative Remedy of Complaints Initiated by Offenders in Bureau of Prisons Facilities" (October 18, 1974). If informal negotiation does not achieve a satisfactory result, he may file a formal complaint with the warden or his designee on forms provided by the prison. The institution must then respond to the charges within 15 days from receipt of the complaint.[13] If the prisoner is not satisfied with the response, he may file an appeal within 30 days with the Bureau Director for the region in which his institution is located, who must reply in writing within 20 days from receipt of the appeal. An adverse decision by the Regional Director may be appealed further to the Bureau of Prisons in Washington, D.C., which must notify the inmate of the disposition of his case within 20 days.[14]

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tary of the North Carolina Department of Correction (A. 120–121). Most other prison systems have similar procedures for the resolution of inmate grievances. See McArthur, *Inmate Grievance Mechanisms: A Survey of 209 American Prisons*, 38 Federal Probation 41 (December 1974).

[13] When the complaint is of an emergency nature and relates to a threat to the inmate's immediate health or welfare, reply must be made as soon as possible and in any event within 48 hours from receipt of the complaint. Policy Statement No. 2001.6A, *supra*, ¶6.

[14] In cases of a sensitive nature, an inmate who reasonably believes that he would be adversely affected if his complaint were known at his institution may file it directly with the Regional Director. Policy Statement No. 2001.6A, *supra*, ¶6.

This procedure has proven to be an effective method of dispute resolution in the federal prisons. In 1975, the last year for which complete statistics are available, 6,076 formal complaints were lodged at the various facilities maintained by the Bureau of Prisons, of which 1,085 (or 18 percent) were resolved in favor of the inmate.[15] Furthermore, about 10 percent of the more than 1,400 appeals taken to the regional director level were granted, as were 13 percent of the approximately 700 appeals to the Bureau in Washington from decisions of the Regional Directors. Thus, federal prisoners received relief in approximately one-fourth

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[15] 4,530 complaints (75 percent) were denied and 461 complaints (7 percent) were dismissed as inappropriate subjects for administrative resolution (*e.g.*, tort claims, sentence reductions, denials of parole). These statistics were compiled by the Bureau of Prisons from monthly submissions by each federal correctional facility.

Although comprehensive statistics on the operation of the Procedure have not yet been compiled for 1976, it is estimated that more than 10,000 complaints were filed at the institutional level, an increase of more than two-thirds the number filed in 1975. The increased utilization of the Procedure may suggest that it is viewed by prisoners as a fair and effective means for the resolution of their grievances. This suggestion also is borne out by the steady increase in the number of monthly filings (from less than 300 in April 1974 to 650 in December 1975) and monthly regional appeals (from less than 80 in November 1974 to more than 160 in December 1975).

The Administrative Office of the United States Courts has attributed the recent decline in the rate of growth of federal prisoner petitions filed in the district courts to the operation of the Procedure. The number of federal prisoner petitions (*i.e.*, habeas corpus petitions, civil rights actions, mandamus petitions, motions to vacate sentence, and petitions to review parole decisions) rose only 1.2 percent in 1975, in contrast to the 10 percent increase experienced the year before. *1975 Annual Report of the Director*, Administrative Office of the United States Courts XI48–XI51. The slow-

of all grievances filed in 1975 under the Administrative Remedy Procedure.

The availability of this existing avenue for the notification of prison officials of inmate grievances and for the settlement of disputes substantially diminishes the purported need for a union. A union grievance procedure would offer no more efficient or effective means of securing relief on a complaint than that afforded by the present system, save for the impermissible express or implied threat to resort to collective action if satisfaction cannot be achieved through negotiation.[16] Indeed, lost in the process of a union-controlled grievance system would be the considerable rehabilitative benefits that are derived from a prisoner's independent attempts at complaint adjustment, attempts that do not depend for their success upon the favor of the inmate leadership.

Even if group expression of inmate grievances through the medium of a union might be marginally more effective in obtaining relief in certain cases, that possibility does not invest prisoners with a constitutionally protected interest in unionization. The fact of incarceration necessarily reduces, in some cases radically, an inmate's associational freedom. A prisoner retains only "those First Amendment rights that are not inconsistent with his status as a prisoner or

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ing of the rate of growth for petitions filed by federal inmates appears to have continued in 1976. See *1976 Semi-Annual Report of the Director*, Administrative Office of the United States Courts 15.

[16] "With no economic power, union militancy would be its only realistic basis for strength." *Paka* v. *Manson*, *supra*, 387 F. Supp. at 123, n. 18.

with the legitimate penological objectives of the corrections system," and the unique status of prisoners may supply reasons for limiting such rights that would be "unimpressive if * * * submitted as justification for governmental restriction of personal communication among members of the general public." *Pell v. Procunier, supra,* 417 U.S. at 822, 825.

The methods chosen by the State, and by the Bureau of Prisons, effectively to prevent inmate unionism are not broader than are necessary to protect the governmental interests involved. In view of the strong institutional and rehabilitative considerations militating against the operation of prison unions and the alternative measures open to inmates, regulations banning the solicitation of membership in or operation of such organizations within the prison walls do not abridge First Amendment rights.

II. THE DECISION OF PRISON AUTHORITIES TO GRANT PRIVILEGES ONLY TO THOSE INMATE ORGANIZATIONS WHOSE OPERATIONS WILL FURTHER LEGITIMATE CORRECTIONAL GOALS DOES NOT VIOLATE EQUAL PROTECTION OF LAW

Our submission thus far has been that prison inmates have no constitutional right to associate together in a union for the purpose of expressing inmate grievances. The penological objections to prison unions are substantial and the prohibition of such organizations works a minimal restriction on the ability of inmates to communicate their complaints about prison conditions. In short, inmate unions pose a true threat

to institutional security and may endanger the rehabilitative aims of imprisonment as well.

The validity of a decision by prison authorities to ban inmate unions is not undermined because other inmate groups, which in the opinion of the responsible officials do not raise similar correctional problems, are permitted to operate in the prison system. Modern penology charges prison officials with the responsibility of rehabilitating the offenders committed to their custody. As we have already noted, the effective exercise of this responsibility necessarily requires efforts to channel an inmate's associational activities in socially and psychologically beneficial directions. So long as their decision is based upon a professional assessment of the rehabilitative and security needs of the prison system, correctional officials must be accorded considerable latitude in choosing the organizations they deem appropriate to achieve this important task.

The district court disagreed with this proposition. It held that the Equal Protection Clause of the Fourteenth Amendment severely restricts the scope of prison officials' discretion to regulate inmate group activity in furtherance of valid penological goals. Since the State permits the Junior Chamber of Commerce and Alcoholics Anonymous to hold meetings of their respective memberships inside its prisons and to mail their organizational literature in bulk into the institutions (thereby deriving the benefits both of ease and of cheaper postal rates), the court held that the Union must be granted

identical privileges.[17] Indeed, in the court's view, except when prison officials have reason to believe that a particular organization threatens a "present danger to security and order" (J.S. App. 30), the Equal Protection Clause demands that *any* inmate group be given precisely the same privileges accorded other organizations that are permitted to operate within the prison—"neither more nor less" (*ibid.*).

This ruling effectively strips prison officials of all but the most limited power to control inmate group activity. It compels officials either to ignore the treatment needs of a large segment of the inmate population by refusing to permit organizations of obvious rehabilitative value (such as Alcoholics Anonymous)

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[17] Although the district court did not address the validity of the restrictions against mass mailings and group meetings under the First Amendment, it apparently did not question the authority of prison officials to ~~prohibit~~ deny privileges if the restriction were uniformly applied to all organizations. If, as we have argued, the State's ban on solicitation and other organizational activities on behalf of the Union does not violate the First Amendment, it would appear to follow that a prohibition on inmate meetings or mass mailings for that purpose also is permissible. See *Procunier* v. *Martinez*, *supra*, 416 U.S. at 408, n. 11.

To the extent that the Union's mailings are used by outsiders to communicate their views to willing inmates, restrictions on newsletter distribution within the prison system may present different problems, because such restrictions would implicate the First Amendment rights of persons who have not been incarcerated. See *Procunier* v. *Martinez*, *supra*, 416 U.S. at 408–409. This case does not squarely present those questions, however, since the State has disavowed any intention to interfere with correspondence between outsiders and individual inmates in which union matters are discussed. That policy apparently extends to individual mailings of the Union's newsletter to inmate subscribers (A. 129, 138–139).

to operate within the prison or to allow all inmate groups the same privilege, regardless of their rehabilitational utility or potential for harm, so long as they cannot be said to constitute an immediate and present threat to prison order.

The district court's decision seriously misperceives the requirements of equal protection as they apply to the discretionary, decision-making authority of correctional officials. Nothing in the Constitution requires prison officials to treat different inmate groups alike except when necessary to deal with an imminent threat of prison violence. Rather, since the distinctions drawn by the State arise "in the course of the State's sensitive and difficult effort to encourage for its prisoners constructive future citizenship," any differences in treatment "require only some rational basis to sustain them." *McGinnis* v. *Royster*, 410 U.S. 263, 269–270. In matters of penal policy, equal protection demands only that "the challenged distinction rationally furthers some legitimate, articulated state purpose." *Id.* at 270. See also *Marshall* v. *United States*, 414 U.S. 417, 428.

A decision by correctional authorities to bar some inmate groups from their prisons entirely (or to impose limitations on the operation of these groups short of a total prohibition on their existence), while at the same time granting other groups full operating privileges, satisfies these constitutional requirements if the decision reflects a good faith judgment as to the rehabilitative and security needs of the correc-

tional system.[18] Here, the State's determination to prohibit inmate union activity within its prisons while permitting two carefully selected organizations—Alcoholics Anonymous and the Junior Chamber of Commerce—to operate inmate chapters meets that criterion. As we already have noted, there is a perceptible rational basis for the fear that an inmate union would loom as a serious potential threat to prison discipline and stability and would frustrate penological goals. By contrast, both of the inmate organizations that the State allows to function within its prisons are of obvious rehabilitative value, and neither group purports to act as a spokesman for its members or is likely to generate unrest.[19]

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[18] Cf. *Greer* v. *Spock*, *supra*, 424 U.S. at 838, n. 10: "The decision of the military authorities that a civilian lecture on drug abuse, a religious service by a visiting preacher at the base chapel, or a rock musicial concert would be supportive of the military mission of Fort Dix surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever."

[19] Director Edwards testified that the purpose of the prison chapters of the Jaycees was the "productive association [of inmates] with stable community representatives and the accomplishment of service projects to the community" and that the continued participation of this group in prison life was "contingent upon its effective accomplishment of tasks which are predefined by the Division of Prisons" (A. 125). He described the Alcoholics Anonymous program as follows: "The objectives of the * * * Program are to provide therapeutic support, insight, and an opportunity for productive sharing of experiences among those who have encountered the deteriorative effects of alcoholism. Alcoholics Anonymous is structured on a peer pressure basis which begins while the individual client is confined and is intended to

The choice of organizations permitted to operate within the State's prison system is therefore rationally related to the achievement of important correctional interests. Accordingly, it does not offend the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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have carry over effects into Alcoholics Anonymous groups in the free community" (A. 126).

Regulations of the Bureau of Prisons delegate primary responsibility to each institution to determine which inmate groups may be accommodated. See Policy Statement No. 7300.115A, *supra*. The organizations presently permitted to operate within federal prisons include ethnic support and cultural groups (*e.g.*, Mex-Amer Self Help Group), religious groups (*e.g.*, Fellowship House), community service groups (*e.g.*, Junior Chamber of Commerce), sports and recreational groups (*e.g.*, softball or chess clubs), and social education and therapy groups (*e.g.*, alcohol and drug abuse groups).

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